2007

Utah County and State of Utah v. Rand Butler, Donna Butler, Margaret Condley, Elizabeth Condley, Blaine Evans, Linda Evans, and John Does : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

UTAH COUNTY and STATE OF UTAH, by and through its DEPARTMENT OF NATURAL RESOURCES, DIVISION OF WILDLIFE RESOURCES, Respondents/Plaintiffs, vs. RANDY BUTLER, DONNA BUTLER, MARGARET CONDLEY, MICHAEL E. CONDLEY, ELIZABETH CONDLEY, BLAINE EVANS, LINDA EVANS and JOHN DOES 1 through 15, Petitioners/Defendants.	Case No. 20070009-SC 20040809-CA

Brief of Respondent Utah County

Review on Writ of Certiorari

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PARTIES TO THE PROCEEDING

UTAH COUNTY and STATE OF UTAH, by and through its DEPARTMENT OF NATURAL RESOURCES, DIVISION OF WILDLIFE RESOURCES,

Respondents,

vs.

RANDY BUTLER, DONNA BUTLER, BLAINE EVANS, and LINDA EVANS,

Petitioners.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred upon the Utah Supreme Court pursuant to the Court's Writ of Certiorari and Utah Code Ann. § 78-2-2(3)(a), 1953 as amended.

ISSUES PRESENTED

1. Respondent Utah County concurs, joins and incorporates herein by this reference the Issues Presented and Standards of Review contained in the brief of Respondent Division of Wildlife Resources.

2. Whether the Court of appeals correctly ruled that Utah County should recover $10 for each day the gate remained within the Bennie Creek Road (hereinafter the Road) right-of-way after notice was complete, pursuant to Utah Code Ann. § 72-7-104(4)(b). Specifically, this issue is divided into the following sub-issues:

   A. Whether the Court of appeals correctly granted Utah County's request to recover $10 for each day the gate remained within the road right-of-way after notice was complete, because the gate placed by Petitioner's across the Road was an "installation" in violation of Utah Code Ann. § 72-7-104(4)(b) and the award of damages is not discretionary with the court. The standard of review for this issue for the court of appeals was correctness because this issue is a question of law. *Allen v. Hall*, 107 P.3d 85 (Utah Ct. App. 2005). On certiorari, this Court reviews the decision of the court of appeals for correctness, not the decision of the trial court. *State*

v. Levin, 2006 UT 50 ¶ 15, 144 P.3d 1096, 1101.

B. Whether the court of appeals correctly granted Utah County's request to recover $10 for each day the gate remained within the Road right-of-way after notice was complete, because the evidence in the record demonstrates that Utah County met its burden of proof on this issue? The standard of review for this issue for the court of appeals was clearly erroneous because this issue is a question of fact. *State v. Pena*, 869 P.2d 932, 935 (Utah 1994), *AWINC Corp. v. Simonsen*, 2005 UT App 168 ¶ 7. On certiorari, this Court reviews the decision of the court of appeals for correctness, not the decision of the trial court. *State v. Levin*, 2006 UT 50 ¶ 15, 144 P.3d 1096, 1101.

DETERMINATIVE LAW

Utah Code Ann. § 72-5-104(1), formerly §27-12-89. "A highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."

UCA § 72-7-104(1)-(7). *See* Addendum.

Utah County Code § 17-3-1-1(a), (b), (c), (d) *See* Addendum.

Utah County v. Butler, 2006 UT App 444, 147 P.3d 963

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Respondent Utah County concurs, joins and incorporates herein by this reference the Statement of the Case and Statement of Facts contained in Respondent Division of Wildlife Resources brief.

Respondent Utah County adds the following Case and Facts Statement relevant to Issue 2 above, the award of $10.00 per day damages for everyday the gate remained in the Road.

NATURE OF THE CASE

This matter comes before the Court for a review of the court of appeals decision affirming the trial court's determination that the Bennie Creek road is a public thoroughfare and that Utah County's is entitled to judgment, joint and several, against Randy Butler and Donna Butler (hereinafter collectively referred to as the "Butlers") at the rate of $10 per day from July 29, 1997 to the date of the Findings of Fact, Conclusions of Law, and Order [August 16, 2004].

PROCEEDINGS BELOW

After eight days of bench trial, the trial court declared that the Bennie Creek road is a public road and denied Utah County's request for judgment, joint and several, against the Butlers at the rate of $10 per day from July 29, 1997 to the date of the Order [August 16, 2004] based on the following finding:

> That for some of the time since construction of the metal Butler gate in 1997 it has been locked and the Road has been obstructed and for some of

> the time it has not. No evidence was presented to clarify how many of the intervening 2,561 days were days when the Road was obstructed and how many were not. The Plaintiffs, as the moving party in seeking to obtain the penalty, had the burden of providing specific evidence of the number of days the Defendants have been in violation. Merely showing initial service and testimony that persons were stopped from time to time during the last 6 or 7 years does not meet that burden. Inasmuch as the Court cannot determine with reasonable precision the number of days during which a violation of the State statute and County ordinances existed no penalty can be imposed.

Petitioners appealed and the court of appeals affirmed the district courts decision declaring the Bennie Creek road to be a public road and granted Utah County's cross appeal declaring Utah County is entitled to $10.00 per day for each day the gate remained in the road right-of-way. Petitioners were granted certiorari by this Court.

STATEMENT OF ADDITIONAL FACTS

Prior to July 29, 1997, the Butlers erected a gate across the Road. (R. at 001645:1074-1075). On July 29, 1997, the Butlers were served with Notices dated July 18, 1997 which were signed by David J. Gardner, Chairman of the Utah County Board of Commissioners, directing them to remove the gate from the Road (hereinafter referred to as "Road"). (R. at 001645:1147 and Plaintiff's Exhibit Nos. 73 and 74). *See* Addendum.

After the aforementioned Notices were served on the Butlers, they did not remove the gate from the Road. (R. at 001645:1147). However, the Butlers did unlock the gate across the Road for approximately 30 days in October of 2001 and again unlocked the gate from August 20, 2002 to October 24, 2002. (R. at 001647: Plaintiff's Exhibit No. 4).

See Addendum. On June 14, 2004 during trial, Randy Butler was asked "After you received that letter [Notice] did you open the gate?" (R. at 001645:1147). Mr. Butler responded "No. . . ." (R. at 001645:1147). Mr. Butler was then asked "Is the gate still closed today and locked?" (R. at 001645:1147). Mr. Butler responded "Yeah." (R. at 001645:1147).

At least 23 witnesses testified at trial that a gate was installed on the Road and locked, which prevented access unless they obtained permission from the Butlers (R. at 001639:19-20, 31, 58, 135, 150-151, 161-162, 165, 167; 001640:203, 208-210, 218, 221, 224, 227, 237, 240, 247-248, 252, 254-255, 261, 266, 279-280, 323, 327, 379, 386-389, 401-402, 418, 421-422, 424; 001641:446-447, 462-464, 467, 478, 485, 532, 537-538, 566; 001642:691).

The Butlers offered two items to negate the $10 per day penalty. First, counsel for the Butlers attempted to introduce into evidence Exhibit No. 83, which was disallowed by the trial court. (R. at 001645:1122-1130).

However, counsel for the Butlers was successful, by stipulation, in introducing into evidence Exhibit No. 84 which purports to provide notice of a public hearing held on February 11, 2003. (R. at 001645:1126-1128). The "Notice of Public Hearing" provides "Notice of Intention of the Board of County Commissioners of Utah County, Utah to Amend the Official Map Ordinance of Utah County, Utah, Part A, by Deleting, Adding, and Re-aligning Certain Roads and Notice of a Public Hearing to Consider Said

Amendment." As it relates to the Road, the "Notice of Public Hearing" provides "Add to Road (from 3523 East 16962 South to 1223 East 16043 South) Sec. 20, 21, 22, 26 & 27 T10S R3E." (R. at 001648:84)

Randy Butler testified that he attended the February 11, 2003 Utah County Commission Meeting and that the Road was discussed. Mr. Butler further testified that the Road was not designated as a county road at that meeting. (R. at 001645:1127-1128). During closing argument, counsel for the Butlers commented that "the County to date has not designated that road as a county road." (R. at 001646:1215).

Contrasted with the testimony of Randy Butler is the testimony of Clyde Naylor. Mr. Naylor testified that he is the County Engineer, County Surveyor, and Public Works Director. Mr. Naylor further testified that Utah County has entered into a number of agreements with the Forest Service for maintenance of the Road (R. at 001639:86-98; Exhibit Nos. 50, 52-58). These agreements with the Forest Service go back to as early as January 8, 1974. (R. at 001639:86). Mr. Naylor also testified of a number of general highway maps of Utah County depicting the Road as a class D road. (R. at 001639:98-110, 114; Exhibit Nos. 60, 62-66). These maps go back to as early as 1955. (R. at 001639:101).

The second item introduced by the Butlers was Exhibit No. 80-C, which is a picture of a sign. Utah County stipulated that it put the sign on the gate. (R. at 001645:1139-1140; 001648:80-C). The sign reads "Keep Gate Closed Private Property to

Forest Service Boundary No Trespassing Off Road." (R. at 001648:80-C)

During closing argument, the trial court made some very interesting and telling statements about the $10 a day penalty. The trial court commented that "Your client was served on the 29th of July, 1997. The road has remained obstructed from then until now. Just totaling it up it's something like 2,300 days. We're talking $23,400 or something. I mean that's – and that's not counting the present year." (R. at 001646:1214). The trial court also stated that "the only testimony I have is that from '96 on the gate was locked. I know from having supervised this case for a little while that there was a period of time by consent when the gate wasn't locked and then it was locked again. I don't know. But none of that testimony was presented at trial, so let's stick to the evidence that I heard at trial." (R. at 001646:1219).

SUMMARY OF ARGUMENTS

1. Respondent Utah County concurs, joins and incorporates herein by this reference the Summary of Arguments contained in Respondent Division of Wildlife Resources' brief.

2. Petitioners have failed to marshal the evidence which support the court of appeals decision that Respondents' witnesses were members of the public, that no trespassing signs posted private property along the Road but not the Road itself and that gates were for stock control. Petitioners fail to marshall any of the testimony of more than 40 of Respondents' witnesses, several state, Forest Service and other maps (dating from as

early as 1955), photographs and other exhibits in evidence showing the Road as a public road. Respondents' evidence, when viewed in the light most favorable to the court of appeals decision, establishes that Respondents' witnesses were lawfully using a public thoroughfare.

Despite the fact that Respondents presented evidence of uninterrupted public use from the 1920's through 1997 by 48 witnesses and 75 exhibits, including maps and 48 photos, Petitioners claim that there was no evidence to marshal in support of the finding of continuous use. Petitioners do nothing more than re-argue Petitioners' witnesses' testimony which was discredited in the trial court's Memorandum Decision.

In the face of evidence of continuous uninterrupted public use from the 1920's through 1997, Petitioners also complain that a specific ten year time period before 1958 or after the early 60's was not identified, yet fail to marshall any evidence which would support a finding of continuous use. To attack this finding the Petitioners are required and have failed to marshal the evidence to show that there is no evidence before or after the identified time periods which would support a finding of continuous public use for any ten year period. The failure to identify a time period is, however harmless error and not reversible as two ten year periods within a 55 year period of continuous public use were identified.

Petitioners failed to provide a list of evidence supporting the factual findings supporting the court of appeals decision and also failed to point out any fatal flaws in the

evidence. In this case Petitioners' failure to marshal results in the assumption that the record supports the decision of the court of appeals. Petitioners do nothing more than re-argue the facts which were not credible as outlined in the trial court's Memorandum Decision. Because Petitioners failed to marshall the evidence, Petitioners' appeal should be dismissed.

3. Petitioners Butler and Evans did not allege Respondents' witnesses were trespassers in their Answer to the Complaint or Amended Complaint as required by the Utah Rules of Civil Procedure. Petitioners, by failing to assert the trespass arguments in the Answer to the Amended Complaint waived this defense. Further, even if not waived, Petitioners carried the burden of establishing the claimed trespass arguments as an affirmative defense and failed to do so. Requiring a party to establish his own case does not shift the burden of proof.

4. Defendants' arguments in I.C. of Petitioners' Brief contain conclusory statements without any supporting case law or analysis and are so inadequately briefed that the court should not consider these arguments. The cases cited in support of the contention that Plaintiffs had the burden to prove by clear and convincing evidence that those traveling the Road were not trespassers did not address the argument.

Petitioners' trespass argument is also not relevant. Landowner acquiescence and consent are not elements required to find dedication of a public thoroughfare. To engage in the examination of whether landowners restricted use of the road invites the Court to

inquire into the consent or acquiescence of the landowner which has previously been rejected as an element of dedication by use. What is consistent with the ruling that land owner consent is not relevant is that trespass does qualify as use within the meaning of the dedication by use statute. Only continuous use by the public for ten years results in dedication by use, not an occasional trespass.

Petitioners do not allege any no trespassing signs prior to the late 1950's or early 1960's, leaving 30 years of public use of the Road before landowners posted the property adjacent to the road. The public did not trespass when traveling the Road which was already established by use. If property owners wrongfully placed gates across the Road and posted no trespassing signs in the late 50's or early 60's, it was long after dedication by public use.

5. Utah statutes establish the laws of the State of Utah respecting the subjects to which the statutes relate and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. UCA 68-3-2. Accordingly, section 72-5-104 and it's predecessor are to be liberally construed to effect the objects of the statute. Rather than being modified by common law, the dedication by use statute modifies common law trespass. Following Petitioners' logic, anyone who physically invaded the land of another are not members of the public for the purpose of dedication by use, rendering the public dedication statute meaningless. Such a construction would prohibit 72-5-104 from being construed with the view to effect

the objects of the statute. Physical invasion of land is an essential element of the public dedication statute. It is not an occasional trespass, but continued public use over the required 10 year period of time which ripens into dedication and abandonment of a public road. Trespass principles have no application to this case.

6. The court of appeals correctly determined that the gate was an "installation" in violation of Utah Code Ann. § 72-7-104, irrespective of whether it was locked or not. The term "installation" in Utah Code Ann. § 72-7-104(4)(b), although not defined, includes gates, locked or not, installed within right-of-ways. In this case, Petitioners Butler erected a gate across the Road and were served with Notices to remove the gate. It is undisputed that the Petitioners did not remove the gate. Furthermore, there is no evidence that the Petitioners ever sought or obtained permission from the Utah County Commission to erect a gate across the Road, locked or not. As a result, the gate was improperly erected across the Road and Respondent Utah County is entitled to the $10 a day penalty.

7. The court of appeals correctly held that after Respondent met its burden under Utah Code § 72-7-104, the trial court did not have discretion to deny the statutory damages. The decision of the court of appeals was a reversal of the trial court decision and a remand for a specific calculation of statutory damages under Utah Code Ann. § 72-7-104. In challenging the court of appeals decision, Petitioners argue that the word "may" as used in Utah Code Ann. § 72-7-104 is used to give the trial court discretion to deny the

statutory damages.

None of the four uses of the word "may" in Utah Code Ann. § 72-7-104, give the trial court discretion to deny the statutory damages. Rather, "may" allows the highway authority to elect its remedy. The words preceding the word "may" are the key words that inform the reader that it is the highway authority which may choose its remedy. There is no mention of the Court. It is simply the highway authority's choice.

Even the title of Utah Code Ann. § 72-7-104 describes that statute as the "rights of highway authorities." It is the right of the highway authority to elect its remedy to either remove the installation or to give notice and collect $10 per day. The title confirms this as well as the subsections read in context.

8. The Petitioners have not briefed nor argued before this court nor before the court of appeals that the evidence at trial was insufficient to warrant the statutory damages specified in Utah Code Ann. § 72-7-104. The failure of Petitioners to respond to Respondent's sufficiency of the evidence arguments is a concession by Petitioners that there was sufficient evidence produced at trial to warrant the statutory damages of Utah Code Ann. § 72-7-104.

9. There is little doubt that the underlying burden of proof on whether the Road has been dedicated and abandoned to the use of the public was by clear and convincing evidence. However, there is also little doubt that the standard of proof as to Utah County's request to recover the $10 per day penalty was preponderance of the evidence.

10. The court of appeals correctly determined that the evidence at trial was sufficient to warrant the statutory damages specified in Utah Code Ann. § 72-7-104. The evidence produced at trial was that the Petitioners erected a gate across the Road and were served with Notices to remove the gate on July 29, 1997. The Petitioners, after being served with the Notices, did not remove the gate from the Road. Furthermore, Petitioner Randy Butler testified that after being served the Notice that he did not open the gate and that the gate was still closed and locked as of the day he testified. Also, at least 23 witnesses testified at trial that a gate was installed on the Road and locked, which prevented access unless they obtained permission from Petitioners. The trial court even commented during closing argument that "Your client was served on the 29th of July, 1997. The road has remained obstructed from then until now. Just totaling it up it's something like 2,300 days. We're talking $23,400 or something. I mean that's – and that's not counting the present year." (R. at 001646:1214). Later during closing argument, the trial court stated that "the only testimony I have is that from '96 on the gate was locked. I know from having supervised this case for a little while that there was a period of time by consent when the gate wasn't locked and then it was locked again. I don't know. But none of that testimony was presented at trial, so let's stick to the evidence that I heard at trial." (R. at 001646:1219). From the evidence produced at trial, it is clear that Respondent met its burden of proof that the gate on the Road was locked from July 29, 1997 through trial. The trial court even so commented.

There was additional evidence in the record, Exhibit 4, a letter from Randy Butler to former Utah County Commissioner Gary L. Herbert, dated December 9, 2002. In that letter, Mr. Butler clearly sets forth the periods of time when the gate was unlocked, which consisted of approximately 30 days in October 2001 and from August 20, 2002 to October 24, 2002 (66 days), for a total of 96 days. There is no additional evidence that the gate across the Road was ever unlocked.

Finally, the two items introduced by the Petitioners consisting of a "Notice of Public Hearing" and a sign placed on the gate were deficient to negate the $10 per day penalty.

ARGUMENT

I. PETITIONERS HAVE FAILED TO MARSHALL THE EVIDENCE IN THIS CASE WHICH SUPPORTS THE COURT OF APPEALS AND TRIAL COURT FINDINGS OF CONTINUOUS USE BY THE PUBLIC.

Petitioners' argue that Respondents' witnesses were trespassers and that Respondents' evidence does not support a finding of continuous use. The court of appeals affirmed the trial court's finding that Respondents witnesses were members of the public and that no trespassing signs posted private property along the Road but not the Road itself. (R. 1465, 66) In support of their arguments, Petitioners referenced only conflicting evidence and fail to mention that Respondents' remaining 40 plus witnesses did not see no trespassing signs and that those cited by Petitioners who did interpreted the signs to post property along the Road.

Respondents evidence of uninterrupted public use from the 1920's through 1996 by 48 witnesses, at all seasons, for various reasons and 75 exhibits including 48 photos, state and other maps from as early as 1955, rebuts Petitioners claim that there was no evidence to marshal in support of the finding of continuous use. None of these witnesses, including Petitioner Butler's predecessors in interest, testified that irrigation, bogs or springs prevented public use of the Road. No facts were found that support a finding of restricted access on the Road. It was ruled that no trespassing signs posted property along the Road and that gates were for stock control.

Petitioners do nothing more than re-argue Petitioners' witnesses' testimony which was discredited in the trial court's Memorandum Decision. See R. 1463-1470. The evidence when viewed in the light most favorable to the court of appeals and trial court decisions, establish that Respondents' witnesses were members of the public continuously using a public thoroughfare. The court of appeals correctly ruled that the trial court's findings supported the conclusions of continuous public use of the Road for 70 years.

Supporting the court of appeals affirming continuous use, the trial court found that ten witnesses personally used the Road for recreation in the 1940's and 50's, none encountered locked gates, sought permission or were prevented from traveling the Road and drove vehicles well into Forest Service property. R. 1470. A 1949 aerial photograph showed the Road extending from U.S. Highway 89 into the vicinity of the National Forest and all of Mr. Butler's predecessors in interest from 1927-1963 (Madge Truman, Virginia

Johnson, Shirlene Ottesen) testified the Road was traveled often by the public and no attempts were made to restrict or deny public access to the Road. R 1471.

In the face of overwhelming evidence of continuous uninterrupted public use from the 1920's through 1997, Petitioners complain that a specific ten year time period before 1958 or after the early 60's was not identified, yet fail to marshall any evidence which would support a finding of continuous use. To attack this finding the Petitioners are required, and have failed, to marshal the evidence to show that there is no evidence before or after the identified time period which would support a finding of continuous public use for ten years. As any ten year period between 1920 and 1997 will support the court of appeals's decision, Petitioners were required to marshall and show that there was no ten year period of continuous public use. In any event, any failure to name a specific 10 year period is harmless error and not reversible as the court found at least two ten year periods before and after the late 1950's and early 1960's within a 55 year span of continuous public use. Defendants also cannot demonstrate that an error, if any was committed, was harmful or of such a magnitude that there is a reasonable likelihood of a more favorable outcome for the Defendants. *State v. Dean*, 2004 UT 63 ¶ 22.

Petitioners' failure to marshal any evidence in support of the continuous use findings is highlighted by the fact that Petitioners' Statement of the Case and Statement of Facts are almost identical, commencing not with the facts relevant to this case, but with Respondents filing this action and detailing procedural matters concluding with the grant

of certiorari. Petitioners' Brief, pp.3-6.

To challenge factual findings one "must marshal the evidence in support of the findings and then demonstrate that despite this evidence the trial court's findings are not supported by clear and convincing evidence." *Young v. Young*, 1999 UT38 15, 979 P.2d 238 (quoting *In Re State of Bartell* 776 P.2d 885, 886 (Utah 1989)(citations omitted.)). To properly marshal the evidence [one] must first list all of the evidence supporting the challenged finding. See, e.g., *Tingey v. Christensen*, 1999 UT 68, ¶7; 987 P.2d 588. [A party] must then show that the marshaled evidence is legally insufficient to support the findings when viewing the evidence and inferences in a light most favorable to the decision. See *Id.* . . . To properly marshal the evidence one must 'show that the findings are not supported by clear and convincing evidence. . . [and] . . . in comprehensive and fastidious order, [present] every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. *West Valley City v. Majestic Inv. Co.,* 818 P.2d 1311, 1315 (Utah App. 1991) emphasis added. *AWINC Corp. v Simonsen,* 2005 UT App 168 ¶9, 10.

Petitioners failed to provide a list of evidence supporting the factual findings relied on by the court of appeals and the trial court. *See Id.*, ¶10. Petitioners not only failed to provide a comprehensive list of evidence but also failed to point out any fatal flaws in the evidence. *Id.* In this case Petitioners' failure to marshal results in the assumption that the record supports the findings of the court of appeals and trial court. *Id.*

When a party fails to marshal the evidence supporting a challenged fact finding, [the court] reject[s] the challenge as "nothing more then an attempt to re-argue the case before [the appellate] court." *Promax Dev. Corp. v. Madsen*, 943 P.2d 247, 255 (Utah Court App. 1997), cert denied 943 P.2d 247 (Utah 1997), *Campbell v. Box Elder County,* 962 P.2d 806, 808 (Utah Ct. App. 1998). Because Petitioners failed to marshall the evidence, Petitioners' appeal should be dismissed.

II. IF RELEVANT AND NOT WAIVED, PROOF THAT RESPONDENTS' WITNESSES WERE TRESPASSERS IS AN AFFIRMATIVE DEFENSE ON WHICH PETITIONERS HAVE THE BURDEN OF PROOF.

Petitioners did not allege Respondents' witnesses were trespassers in their Answer to the Complaint or Amended Complaint as required by the Utah Rules of Civil Procedure. R. 277, 130. The Utah Rules of Civil Procedure require a party to state in short and plain terms his defenses to each claim asserted. URCP 8(b). A party is further required to set forth affirmatively any matter constituting an avoidance or affirmative defense. URCP 8(c). Every defense in law or fact to a claim for relief in any pleading shall be asserted in the responsive pleading thereto if one is required. URCP 12(b). A party waives all defenses and objections not presented either by motion or by answer or reply. URCP 12(h). Petitioners failure to assert the trespass arguments in the Answer to the Amended Complaint results in a waiver of this defense.

Petitioners had the burden of establishing the claimed trespass arguments as an affirmative defense and failed to do so. As Respondents presented primae facie evidence

of public and continuous use, that postings and signs restricted access to property along the Road, that the Road was used in all seasons and at all times and gates were used for stock control, it was the Petitioners that had the burden to show that use was not by the public or continuous. Petitioners instead seek to shift their burden of proof to Respondents. Requiring a party to establish his own case does not shift the burden of proof. Affirmative defenses require the party asserting them to meet the burden of proof as to every necessary element. *Messick v. PHD Trucking Services, Inc.,* 615 P.2d 1276, 1277 (Utah 1980).

III. PETITIONERS' ARGUMENT THAT RESPONDENTS HAD THE BURDEN OF PROOF TO SHOW THEIR WITNESSES WERE NOT TRESPASSERS IS MERITLESS

A. Petitioners' Arguments Are Inadequately Briefed.

Arguments that contain no meaningful analysis are inadequately briefed and should not be considered. See *Bernat v. Allphin 2005 UT 1, ¶ 38, 106 P.3rd 707.* Petitioners' arguments in I.C. of Petitioner's brief contain conclusory statements without any supporting case law or analysis and are so inadequately briefed that the court should not consider these arguments. The cases cited in support of the contention that Respondents had the burden to prove by clear and convincing evidence that those traveling the Road were not trespassers do not support their argument. The contention that the court of appeals and trial court impermissibly relieved Respondents of their burden to prove dedication by clear and convincing evidence by not applying trespass

principles is not supported by case law and is lacking any legal argument or analysis. Petitioners' arguments in section IC of their brief are mere assertions without legal support or analysis and should be rejected .

B. Whether Members of the Public Are Trespassers Is Not Relevant.

Petitioners' trespass argument is also not relevant as it has been previously decided that consent of the land owner is not a relevant issue to dedication of a public thoroughfare. *Heber City Corp. V. Simpson,* 942 P.2d 307, 311(Utah 1997). What is consistent with the ruling that land owner consent is not relevant is that trespass does qualify as use within the meaning of the dedication by use statute. Since owner intent is irrelevant, whether the Road was posted or whether any of those using the Road were trespassers is not relevant. The only issue addressed in the cases cited by Petitioners is whether the use was permissive which Petitioners have not asserted. Furthermore, an occasional trespass is insufficient to create a public Road. A court can rightly assume that a landowner that does not prevent public travel through his property for ten years has dedicated and abandoned the way to public use. A land owner that is diligent in preventing travel across his property, will prevent a public thoroughfare from being created by trespassers. Travel by an occasional trespasser is not sufficient to create a public thoroughfare.

In fact the public did not trespass when traveling the Road which was already established by use prior to posting the property adjacent to the Road. If property owners

wrongfully placed gates across the Road and posted no trespassing signs in the late 50's or early 60's, it was long after dedication by public use. However, as found by the court of appeals the trial court properly found that posted signs prevented travel off the Road and gates were placed to control stock and not restrict Road access.

C. Petitioners' Trespass Argument is Fatally Flawed.

Even if Petitioners' arguments regarding trespass were relevant or properly raised, Petitioners do not allege any no trespassing signs prior to the late 1950's or early 1960's, leaving 30 years of public use of the Road before landowners posted the property adjacent to the Road. Taking the converse of Petitioners' arguments, if seven individuals were trespassers because they saw trespass signs and their use could not be public use because they were trespassers, the use of the Road from the 1920's to the late 1950's or early 1960's would then be public use as the property was not posted no trespassing. Public access on the Road was also not restricted as signs posted property along the Road and gates were for stock control only.

IV. UCA 72-5-104 IS NOT SUBJECT TO TRESPASS PRINCIPLES.

At statehood the common law of England so far as it was not repugnant to or in conflict with the constitution or laws of the State of Utah was adopted. UCA 68-3-1. The rule of the common law that statutes in derogation of the common law are to be strictly construed has no application to Utah statutes. Utah statutes and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to

promote justice. UCA 68-3-2. UCA 72-5-104 formerly UCA 27-12-89 has remained substantially unchanged since first enacted by the territorial legislature in 1886. *Lindsay Landon Livestock Co. v. Churnos* 75 Utah 384, 285 P.2d 646, 648 (Utah 1929). R 1473. Section 72-5-104 and it's predecessors are to be liberally construed to effect the objects of the statute. Rather than being modified by the common law, the dedication by use statute modifies common law trespass.

Use of the Road as a public thoroughfare for a period of ten years is the question before the court, not whether the public were trespassers. Following Petitioners' logic anyone who physically invaded the land of another are not members of the public for the purpose of dedication by use, rendering the public dedication statute meaningless. Such an interpretation prohibits U.C.A. 72-5-104 from being liberally construed with the view to effect the objects of the statute. UCA 68-3-2. Under Petitioners' argument no one could be a member of the public under the public dedication statute as the courts have previously determined that permissive use of a thoroughfare cannot ripen into a public way. To engage in the examination of whether the use of the Road was restricted as suggested by Petitioners engages the court in an examination of whether the landowner consented or acquiesced in the use which has already been rejected. To the contrary, physical invasion of a public thoroughfare is an essential element of the public dedication statute. Utah statutes have modified the common law. Trespass principles have no application to this case.

V. INCORPORATION OF DIVISION OF WILDLIFE RESOURCES BRIEF.

To the extent not incorporated above, Respondent Utah County adopts, joins in concurs with and incorporates herein by this reference all arguments and sections of the Respondent Division of Wildlife Resources brief filed in this matter.

VI. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE GATE WAS AN "INSTALLATION" IN VIOLATION OF UTAH CODE ANN. § 72-7-104(4)(b) IRRESPECTIVE OF WHETHER IT WAS LOCKED OR NOT.

The court of appeals correctly determined that the gate was an "installation" in violation of Utah Code Ann. § 72-7-104(4)(b) irrespective of whether it was locked or not. Utah Code Ann. § 72-7-104(4)(b) provides that a "highway authority may recover $10 for each day the **installation** remained within the right-of-way after notice was complete." (emphasis added). The term "installation" is not defined in the Protection of Highways Act, Chapter 7 of Title 72 of the Utah Code.

However, Utah Code Ann. § 72-7-104(1) provides some insight as to the meaning of the term "installation" as follows:

> If any person, firm, or corporation installs, places, constructs, alters, repairs, or maintains any approach road, driveway, pole, pipeline, conduit, sewer, ditch, culvert, outdoor advertising sign, or any other structure or object of any kind or character within the right-of-way of any highway without complying with this title, the highway authority having jurisdiction over the right-of-way may:
>
> (a) remove the installation from the right-of-way or require the person, firm, or corporation to remove the installation; or
> (b) give written notice to the person, firm, or corporation to remove the installation from the right-of-way.

The above subsection is all encompassing and certainly contemplates gates, locked or not, installed within right-of-ways. Likewise, the term "installation" in Utah Code Ann. § 72-7-104(4)(b) would also contemplate gates, locked or not, installed within right-of-ways.

In this case, Petitioner Randy Butler admits that prior to July 29, 1997, the Butlers erected a gate across the Road. (R. at 001645:1074-1075). Mr. Butler also admits that he and his wife, Donna Butler were served on July 29, 1997 with Notices dated July 18, 1997 and signed by David J. Gardner, Chairman of the Utah County Board of Commissioners, directing them to remove the gate from the Road. (R. at 001645:1147 and Plaintiff's Exhibit Nos. 73 and 74.) *See* Addendum.

At trial on June 14, 2004, Randy Butler was asked "After you received that letter [Notice] did you open the gate?" (R. at 001645:1147). Mr. Butler responded "No. . . ." (R. at 001645:1147). Mr. Butler was then asked "Is the gate still closed today and locked?" (R. at 001645:1147). Mr. Butler responded "Yeah." (R. at 001645:1147). During closing argument, the trial court commented that "Your client was served on the 29th of July, 1997. The road has remained obstructed from then until now." (R. at 001646:1214). It is undisputed that after the aforementioned Notices were served on the Butlers, they did not remove the gate from the Road.

A "gate is not allowed on a county road unless authorized by the county executive in accordance with the provisions of this section [Utah Code Ann. § 72-7-106]." Utah Code Ann § 72-7-106(5)(a). In other words, a person seeking to install a gate in a right-

of-way must comply with Utah Code Ann. § 72-7-106 by seeking and obtaining the permission of the county executive. There is no evidence that the Butlers ever sought or obtained permission from the Utah County Commission to erect a gate across the Road, locked or not. It is interesting to note that nowhere in the Protection of Highways Act, Chapter 7 of Title 72 of the Utah Code, does it provide for the locking of gates on county roads. Even if we assume that permission was obtained to erect a gate across the Road, that permission would certainly have been terminated by the serving of the aforementioned Notices on the Butlers, pursuant to Utah Code Ann. § 72-7-106(5)(b).

The court of appeals correctly determined that the gate was an "installation" in violation of Utah Code Ann. § 72-7-104(4)(b) irrespective of whether it was locked or not, thereby reversing the decision of the trial court. Therefore, the court of appeals decision should be upheld and Utah County should be granted judgment in the amount of $10 for each day the gate remained within the right-of-way after notice was complete from July 29, 1997 to August 16, 2004 [the date of the Findings of Fact, Conclusions of Law, and Order] for a total of 2,574 days and $25,740.00.

VII. THE DISCRETION AFFORDED BY UTAH CODE § 72-7-104 RESTS WITH THE HIGHWAY AUTHORITY, NOT THE COURTS.

The court of appeals correctly held that after Utah County met its burden under Utah Code § 72-7-104, the trial court did not have discretion to deny the statutory damages. The decision of the court of appeals was a reversal of the trial court decision and a remand for a specific calculation of statutory damages under Utah Code Ann. § 72-

7-104. In challenging the court of appeals decision, Petitioners argue that the word "may" as used in Utah Code Ann. § 72-7-104 is used to give the trial court discretion to deny the statutory damages.[1] There are four instances that the word "may" is used in Utah Code Ann. § 72-7-104, none of which give the trial court discretion to deny the statutory damages. Rather, "may" allows the highway authority to elect its remedy. Petitioners will address all four uses of the word "may" in Utah Code Ann. § 72-7-104.

A. Use of the Word "May" in Utah Code Ann. § 72-7-104(1).

The first instance of the use of the word "may" in Utah Code Ann. § 72-7-104 occurs in subsection (1), which reads as follows:

> (1) If any person, firm, or corporation installs, places, constructs, alters, repairs, or maintains any approach road, driveway, pole, pipeline, conduit, sewer, ditch, culvert, outdoor advertising sign, or any other structure or object of any kind or character within the right-of-way of any highway without complying with this title, the **highway authority having jurisdiction over the right-of-way may**:
>
> (a) remove the installation from the right-of-way or require the person, firm, or corporation to remove the installation; or
>
> (b) give written notice to the person, firm, or corporation to

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[1]The issue of discretion was raised by the court of appeals during oral argument. The trial court did not deny the statutory damages by exercising its perceived discretion. Rather, the trial court denied the statutory damages based on insufficient evidence. Petitioners have never argued to uphold the decision of the trial court or reverse the court of appeals based on insufficient evidence. The failure of Petitioners to argue insufficiency of the evidence is akin to an admission that the evidence was sufficient to sustain the statutory damages. Furthermore, Respondent will demonstrate that the evidence was sufficient to prove compliance with Utah Code Ann. § 72-7-104. *See* Parts IX and X herein.

remove the installation from the right-of-way.

(emphasis added). Subsection (1) is essentially an election of remedies provision which gives the highway authority the discretion to either remove the installation, or to give notice to the responsible party to remove the installation. The words preceding the word "may" which are emphasized above are the key words that inform the reader that it is the highway authority which may choose its remedy. There is no mention of the court. It is simply the highway authority's choice.

This is important because both options in Subsection (1) bring a disadvantage. By illustration, if the highway authority chooses to simply remove the installation, then the highway authority and its agents may be subject to a trespass claim. *See Bloomquist v. Summit County*, 483 P.2d 430 (Utah 1971) (where this Court held that summary judgment was inappropriate because of issues of fact, but discussed the possibility that government officials may not be protected by immunity from suit when they tear down a gate on a private road.). On the other hand, if the highway authority chooses to give proper notice to the responsible party and seek relief in court, then the case may drag on for years, like in the present case.

B. Use of the Word "May" in Utah Code Ann. § 72-7-104(4).

The second instance of the use of the word "may" in Utah Code Ann. § 72-7-104 occurs in subsection (4), which reads as follows:

A **highway authority may recover**:

> (a) the costs and expenses incurred in removing the installation, serving notice, and the costs of a lawsuit if any; and
>
> (b) $10 for each day the installation remained within the right-of-way after notice was complete.

(emphasis added). Just like Subsection (1), it is the words preceding the word "may" and emphasized above which are the key words that inform the reader of Subsection (4) that it is the highway authority which has the discretion to determine its recovery. Again, there is no mention of the court. It is simply the highway authority's choice. The use of the word "may" also recognizes that if the highway authority chooses the self help provision, then the $10 per day would not be available, or that the cost of removing the gate is not available if the owner complied with the notice to remove the gate.

C. Use of the Word "May" in Utah Code Ann. § 72-7-104(5)(a).

The third instance of the use of the word "may" in Utah Code Ann. § 72-7-104 occurs in subsection (5)(a), which reads as follows:

> If the person, firm, or corporation disputes or denies the existence, placement, construction, or maintenance of the installation, or refuses to remove or permit its removal, the **highway authority may bring an action** to abate the installation as a public nuisance.

(emphasis added). Just like Subsections (1) and (4) above, it is the words preceding the word "may" and emphasized above which are the key words that inform the reader that Subsection (5)(a) that it is the highway authority which has the discretion to bring an

action to abate the installation as a public nuisance. There is no mention of the court. It is simply the highway authority's choice.

D. Use of the Word "May" in Utah Code Ann. § 72-7-104(5)(b).

The fourth and final instance of the use of the word "may" in Utah Code Ann. § 72-7-104 occurs in subsection (5)(b), which reads as follows:

> If the highway authority is granted a judgment, the **highway authority may recover the costs** of having the public nuisance abated as provided in Subsection (4).

(emphasis added). This is the same song and fourth verse. It is the words preceding the word "may" and emphasized above which are the key words that inform the reader that Subsection (5)(b) that it is the highway authority which has the discretion to recover the costs of having the public nuisance abated. There is no mention of the court. It is simply the highway authority's choice.

E. The Title of Utah Code Ann. § 72-7-104 Confirms That the Discretion Afforded Rests with the Highway Authority, Not the Courts.

If there is ever a question as to the intent of Utah Code Ann. § 72-7-104, one may look no further than its title, which states "Installations constructed in violation of rules--**Rights of highway authorities** to remove or require removal." (emphasis added). The title of Utah Code Ann. § 72-7-104 describes that statutes as the "rights of highway authorities." That it is the right of the highway authority to elect its remedy to either remove the installation or to give notice and collect $10 per day is confirmed by the title

as well as the above subsections read in context.

Therefore, this Court should uphold the decision of the court of appeals, which held that after Utah County met its burden under Utah Code § 72-7-104, the trial court did not have discretion to deny the statutory damages. Utah County should be granted judgment in the amount of $10 for each day the gate remained within the right-of-way after notice was complete from July 29, 1997 to August 16, 2004 [the date of the Findings of Fact, Conclusions of Law, and Order] for a total of 2,574 days and $25,740.00.

VIII. TO THIS POINT, PETITIONERS HAVE NOT BRIEFED NOR ARGUED THAT THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO WARRANT THE STATUTORY DAMAGES SPECIFIED IN UTAH CODE ANN. § 72-7-104.

To this point, the Petitioners have not briefed nor argued before this court nor before the court of appeals that the evidence at trial was insufficient to warrant the statutory damages specified in Utah Code Ann. § 72-7-104.

"If an appellee fails to respond to an issue in its brief, the court may treat the failure to respond as a confession that the appellant's position is correct . . . or determine that the issue has merit." 5 Am Jur. 2d. *Appellate Review*, §555; *See also Nance v. Miami Sand & Gravel, LLC.*, 825 N.E.2d 826 (Ind. Ct. App. 2005) ("appellee's failure to respond to an issue raised in an appellant's brief is, as to that issue, akin to failing to file a brief.") The failure to respond to the merits of a controversy can be considered a confession of reversible error. *See Bulova Watch Co. v. Super City Dept. Stores of Ariz., Inc.*, 4 Ariz.App. 553, 422 P.2d 184 (Ariz. Ct. App. 1967).

In Utah County's briefs, both before the court of appeals and now this Court, Utah County has argued that the evidence produced at trial was sufficient to warrant the statutory damages of Utah Code Ann. § 72-7-104. Petitioners have not responded and now have conceded that there was sufficient evidence produced at trial to warrant the statutory damages of Utah Code Ann. § 72-7-104. Therefore, this court should uphold the decision of the court of appeals, which reversed the decision of the trial court, thereby ruling that there was sufficient evidence produced at trial to warrant the statutory damages of Utah Code Ann. § 72-7-104.

IX. THE UNDERLYING BURDEN OF PROOF ON WHETHER UTAH COUNTY IS ENTITLED TO RECOVER $10 FOR EACH DAY THE GATE REMAINED WITHIN THE RIGHT-OF-WAY AFTER NOTICE WAS COMPLETE WAS PREPONDERANCE OF THE EVIDENCE.

The underlying burden of proof on whether the Road has been dedicated and abandoned to the use of the public was by clear and convincing evidence. *See Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995). However, "there is similarly little doubt that the standard of proof generally applied in civil proceedings is the preponderance of the evidence standard." *See Hansen v. Hansen*, 958 P.2d 931, 935-6 (Utah Ct. App 1998) (*citing Johns v. Shulsen*, 717 P.2d 1336, 1338 (Utah 1986) ("It is universally recognized that the standard of proof in civil actions is by a preponderance of the evidence."); *Lipman v. Industrial Comm'n*, 592 P.2d 616, 618 (Utah 1979) (noting preponderance is "usual standard of proof ... used in most civil actions"); *Morris v. Farmers Home Mut. Ins. Co.*, 28 Utah 2d 206, 500 P.2d 505, 507 (1972) (stating

preponderance is "universally recognized standard of proof required to establish facts in a civil case")). This usual standard of proof of a preponderance of evidence applies to Utah County's request to recover $10 for each day the gate remained within the right-of-way after notice was complete, pursuant to Utah Code Ann. § 72-7-104(4)(b).

X. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE EVIDENCE AT TRIAL WAS SUFFICIENT TO WARRANT THE STATUTORY DAMAGES SPECIFIED IN UTAH CODE ANN. § 72-7-104.

The court of appeals correctly determined that the evidence at trial was sufficient to warrant the statutory damages specified in Utah Code Ann. § 72-7-104. The evidence produced at trial was that prior to July 29, 1997, the Butlers erected a gate across the Road. (R. At 001645:1074-1075). On July 29, 1997 the Butlers were served with Notices dated July 18, 1997 and signed by David J. Gardner, Chairman of the Utah County Board of Commissioners, directing them to remove the gate from the Road. (R. At 001645:1147 and Plaintiff's Exhibit Nos. 73 and 74.)

After the aforementioned Notices were served on the Butlers, they did not remove the gate from the Road. (R. at 001645:1147). On June 14, 2004 during trial, Randy Butler was asked "After you received that letter [Notice] did you open the gate?" (R. at 001645:1147). Randy Butler responded "No. . . ." (R. at 001645:1147). Mr. Butler was then asked "Is the gate still closed today and locked?" (R. at 001645:1147). Randy responded "Yeah." (R. at 001645:1147).

At least 23 witnesses testified that Butler's gate was installed on the Road and

prevented access unless they obtained permission from the Butlers (R. at 001639:19-20, 31, 58, 135, 150-151, 161-162, 165, 167; 001640:203, 208-210, 218, 221, 224, 227, 237, 240, 247-248, 252, 254-255, 261, 266, 279-280, 323, 327, 379, 386-389, 401-402, 418, 421-422, 424; 001641:446-447, 462-464, 467, 478, 485, 532, 537-538, 566; 001642:691).

During closing argument, the trial court commented that "Your client was served on the 29th of July, 1997. The road has remained obstructed from then until now. Just totaling it up it's something like 2,300 days. We're talking $23,400 or something. I mean that's – and that's not counting the present year." (R. at 001646:1214). Later during closing argument, the trial court stated that "the only testimony I have is that from '96 on the gate was locked. I know from having supervised this case for a little while that there was a period of time by consent when the gate wasn't locked and then it was locked again. I don't know. But none of that testimony was presented at trial, so let's stick to the evidence that I heard at trial." (R. at 001646:1219).

Furthermore, there was additional evidence in the record, such as a letter from Randy Butler to former Utah County Commissioner Gary L. Herbert, dated December 9, 2002, in which Mr. Butler set forth with reasonable precision the amount of days that he left the gate unlocked. (R. at 001647: Plaintiff's Exhibit No. 4). In that letter, Mr. Butler states that "in October of 2001, we agreed to allow access for the hunts. That fall Utah County put up a sign on the gate that stated it was private property to the U.S. Forest Service Land. We left the gate unlocked for approximately 30 days. . . . We locked the

gate again until August 20, 2002 without incident. . . . Consequently, I locked the gate on October 24, 2002, and as of December 1, 2002, there has not been any problem." (R. at 001647: Plaintiff's Exhibit No. 4).

The only evidence to the contrary offered by Respondents was the "Notice of Public Hearing" and a sign placed on the gate across the Road by Utah County as part of a temporary settlement proposal in October of 2001 and discussed in the previous paragraph. However, those two items were deficient to negate the $10 per day penalty proscribed in Utah Code Ann. § 72-7-104.

The first item presented by the Respondents was Exhibit No. 83, which was disallowed by the trial court. (R. at 001645:1122-1130). However, Respondents, by stipulation, introduced Exhibit No. 84 into evidence which purports to provide notice of a public hearing held on February 11, 2003. (R. at 001645:1126-1128). The "Notice of Public Hearing" provides "Notice of Intention of the Board of County Commissioners of Utah County, Utah to Amend the Official Map Ordinance of Utah County, Utah, Part A, by Deleting, Adding, and Re-aligning Certain Roads and Notice of a Public Hearing to Consider Said Amendment." As it relates to the Road, the "Notice of Public Hearing" provides "Add to Bennie Creek Road (from 3523 East 16962 South to 1223 East 16043 South) Sec. 20, 21, 22, 26 & 27 T10S R3E" as a class "B" county road. (R. at 001648:84)

Randy Butler testified that he attended that February 11, 2003 Utah County Commission Meeting and that the Road was discussed. Mr. Butler further testified that

the Road was not designated as a county road at that meeting. (R. at 001645:1127-1128). During closing argument, counsel for the Butlers commented that "the County to date has not designated that road as a county road." (R. at 001646:1215).

Contrasted with the testimony of Randy Butler is the testimony of Clyde Naylor. Mr. Naylor testified that he is the County Engineer, County Surveyor, and Public Works Director. Mr. Naylor further testified that Utah County has entered into a number of agreements with the Forest Service for maintenance of the Road (R. at 001639:86-98; Exhibit Nos. 50, 52-58). These agreements with the Forest Service go back to as early as January 8, 1974. (R. at 001639:86). Mr. Naylor also testified of a number of general highway maps of Utah County depicting the Road as a class D road. (R. at 001639:98-110, 114; Exhibit Nos. 60, 62-66). These maps go back to as early as 1955. (R. at 001639:101).

As a result of the testimony of Clyde Naylor, it is evident that Utah County has considered the Road as a class D county road since at least as early as 1955. In each of the aforementioned maps and agreements, the Road is so designated as a class D county road. Clearly, the weight of evidence demonstrates that Utah County has so designated the Road as a class D county road.

The second item introduced by the Respondents was Exhibit No. 80-C, which was a picture of a sign. Utah County stipulated that it put the sign on the closed gate. (R. at 001645:1139-1140; 001648:80-C). The sign reads "Keep Gate Closed Private Property to

Forest Service Boundary No Trespassing Off Road." (R. at 001648:80-C). Utah County merely installed this sign to be a good neighbor, to instruct the public to stay on the Road, and as part of a temporary settlement to allow hunters to use the Road in October of 2001 following the TRO hearing.

Neither the "Notice of Public Hearing" nor the sign are evidence that the Road is a private road. Likewise, neither the "Notice of Public Hearing" nor the sign are evidence that Utah County allowed the Respondents to install a gate across the Road. Therefore, the trial court properly ignored these two items offered by the Petitioners.

Respondents can point to no other evidence to the contrary because there is none. The trial court even so commented when it said "the only testimony I have is that from '96 on the gate was locked. I know from having supervised this case for a little while that there was a period of time by consent when the gate wasn't locked and then it was locked again. I don't know. But none of that testimony was presented at trial, so let's stick to the evidence that I heard at trial." R. at 001646:1219). Petitioners' evidence does not rebut Utah County's evidence entitling Utah County to the statutory damages.

Therefore, this court should uphold the decision of the court of appeals that the evidence at trial was sufficient to warrant the statutory damages specified in Utah Code Ann. § 72-7-104, thereby reversing the decision of the trial court. As a result, Utah County should be granted judgment in the amount of $10 for each day the gate remained within the right-of-way after notice was complete from July 29, 1997 to August 16, 2004

[the date of the Findings of Fact, Conclusions of Law, and Order] for a total of 2,574 days and $25,740.00 or in the alternative subtract 94 days for the time the gate was unlocked in October 2001, and from August 20, 2002 to October 24, 2002 and adjust the judgment accordingly.

CONCLUSION

Based on the forgoing, and on the brief of Respondent State of Utah, Division of Wildlife Resources, Respondent Utah County respectfully requests:

1. That the Court uphold the decision of the court of appeals affirming the trial court's determination that the Road is a public thoroughfare having been continuously used by the public for a period of ten years and dismiss Petitioners' appeal,

2. That the Court affirm the court of appeals decision ordering that on remand Utah County is entitled to judgement against Petitioners Butler for statutory damages of $10.00 for each day that the gate remained in the Road right of way after service of the Notice to remove the same, or in the alternative, for $10.00 for each day the gate remained locked across the Bennie Creek Road after service of the Notice to remove the same.

3. For Plaintiff's costs incurred in this matter including costs on appeal.

4. For such further relief as is just and equitable in the premises.

RESPECTFULLY SUBMITTED this 25th day of June, 2007.

M. CORT GRIFFIN
Deputy Utah County Attorney

ROBERT J. MOORE
Deputy Utah County Attorney

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing **RESPONDENT'S BRIEF**, on this 25 day of June, 2007, to the following:

SCOTT L. WIGGINS
Arnold & Wiggins, P.C.
57 West 200 South #105
Salt Lake City, Utah 84101

MARTIN B. BUSHMAN
Assistant Attorney General
Utah Attorney General's Office
1594 West North Temple, Suite 300
Salt Lake City, Utah 84116

ADDENDUM

72-7-104. Installations constructed in violation of rules - Rights of highway authorities to remove or require removal.

(1) If any person, firm, or corporation installs, places, constructs, alters, repairs, or maintains any approach road, driveway, pole, pipeline, conduit, sewer, ditch, culvert, outdoor advertising sign, or any other structure or object of any kind or character within the right-of-way of any highway without complying with this title, the highway authority having jurisdiction over the right-of-way may:

(a) remove the installation from the right-of-way or require the person, firm, or corporation to remove the installation; or

(b) give written notice to the person, firm, or corporation to remove the installation from the right-of-way.

(2) Notice under Subsection (1)(b) may be served by:

(a) personal service; or

(b) (i) mailing the notice to the person, firm, or corporation by certified mail; and

(ii) posting a copy on the installation for ten days.

(3) If the installation is not removed within ten days after the notice is complete, the highway authority may remove the installation at the expense of the person, firm, or corporation.

(4) A highway authority may recover:

(a) The costs and expense incurred in removing the installation, serving notice, and the costs of a lawsuit if any; and

(b) $10 for each day the installation remained within the right-of-way after notice was complete.

(5) (a) If the person, firm, or corporation disputes or denies the existence, placement, construction, or maintenance of the installation, or refuses to remove or permit its removal, the highway authority may bring an action to abate the installation as a public nuisance.

(b) If the highway authority is granted a judgment, the highway authority may recover the costs of having the public nuisance abated as provided in Subsection (4).

(6) The department, its agents, or employees, if acting in good faith, incur no liability for causing removal of an installation within a right-of-way of a highway as provided in this section.

(7) The actions of the department under this section are not subject to the provisions of Title 63, Chapter 46b, the Administrative Procedures Act.

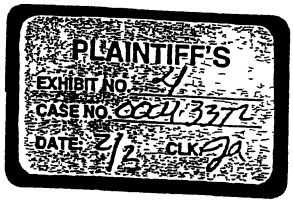
17-3-1-1. Enforcement

If any person places, constructs, or maintains any approach road, driveway, pole, pipeline, conduit, sewer, ditch, culvert, billboard, advertising sign, or any other structure or object of any kind of character within the right-of-way of any county road, without first obtaining permission from the Board of County Commissioners, the Commissioners may:

(a) remove such installation from the right-of-way or require such person to remove the same; or

(b) give written notice to such person to remove such installation from the right-of-way; such notice may be served either by personal service or by mailing the notice to the person by registered mail and posting a copy thereof on such installation for a period of ten (10) days; and if such installation is not removed within ten (10) days after the notice is complete, the Commission may remove the same at the expense of the person and recover costs and expenses, and also the sum of ten dollars ($10.00) for each day the same remained within the right-of-way after notice was complete, in an action for that purpose; or,

(c) if such person disputes or denies the existence of such installation, or refuses to remove or permit its removal, the Commission may bring an action to abate the same as a nuisance; and if judgment is recovered, in addition to having the same abated, the costs of action and the sum of ten dollars ($10.00) for every day such nuisance remained within the right-of-way after notice was given for its removal in the manner provided in Subsection (b) of this Section.



December 9, 2002

TO: Commissioner Herbert
FROM: Randy Butler & Blaine Evans

RE: Bennie Creek Road

Gary, the following is a chronological list of most of the problems that have occurred. I appreciate your willingness to review this matter.

From 1987 to 1993, we had 7 cattle shot, 3 calves stolen, our truck taken on 2 occasions and our backhoe taken once. Our fences have been cut in numerous places and at numerous times. People drive through the pastures while they are being irrigated, creating deep ruts that create erosion. The locks or chains have been cut on the gates leading into our pastures on 4 occasions. I caught one of these individuals and he said he didn't know it was private property. When he had to pass 4 private property and/or no trespassing signs and had to cut the chain to get access to where he was.

We've had people come at 3:00 a.m., built a fire in our front yard and rode snowmobiles up and down the road all morning. They chased a cougar, caught it, killed it and never left posted private property!

During this time, there were many times(almost weekly) that there was a drug and/or alcohol party either on private posted property or on the U.S. Forest. We could not let our own children camp on our own property for fear of what could happen. We would pick up beer cans, syringes, clothing and even mattresses after they would leave.

During this time, law enforcement responded one time, the were called 4 times.

In 1993, we started restricting access, first with a rope and a sign across the road, then a chain for 2 years and finally the gate that presently exists.

From 1994 to 2001, we required people to sign permission slips to gain access. During this time, we've had many instances where people would try to drive through our backyard. One individual drove over our sprinkler pipes. We called the sheriff but no one ever responded. We also had the incident I mentioned to you. About a Mr. Kent Lemon threatening my wife's life.

In October of 2001, we agreed to allow access for the hunts. That fall Utah County put up a sign on the gate that stated it was private property to the U.S. Forest Service Land. We left the gate unlocked for approximately 30 days. In which time, we had three different groups in our pastures that we caught and 2 on the Evans' Property. No law enforcement ever responded in any of these cases. We locked the gate again until August 20, 2002 without incident.

Since August 20, 2002, the following problems have occurred. Remember, this is while the gate is unlocked. The gate between the Howell's Property and the U.S. Forest Service has been left open twice. This gate is ½ mile north of the Bennie Creek Road and it has never been a problem before. The fence between the Evan's Property and the U.S. Forest Service has been cut and the gate left open in the same area.

Countless people have ridden ATV's through private property and the forest property, which would be fine except we get the blame for it. On 2 occasions, there have been people on ATV's in the middle of the night riding around in our pastures. We have caught people trespassing twice, called law enforcement and had no response.

On many occasions, the signs on the gates and fences get shot numerous times. A new electric fence controller was shot as well as the private property sign next to it. Our kitchen window was shot with a bullet going through the kitchen , ricocheting off the inside door and into the pantry. As well as another hole in the wall just below the window. The signs on the gate that is approximately 75 feet from our home were shot again.

Consequently, I locked the gate on October 24, 2002, and as of December 1, 2002, there has not been any problem. I also have dates and times for most of these occurrences if they are needed.

Gary, I appreciate your time in reviewing this matter. I hope it can be resolved I don't think the County wants this liability anymore than we do.

Thank You

P.S. Would you please let me know of the financial feasibility concerning this matter A.S.A.P.. Also I have enclosed a list of additional stipulations that should help with the problems we discussed the other day.

Respectfully,

Randy Butler

Randy Butler

Blaine Evans

Blaine Evans

cc:

Mark Arnold

STIPULATIONS

1. Utah County will provide a law enforcement officer on Friday and Saturday nights from 4:00 p.m. until 10:00 p.m. from April 15th to November 15th. This would help eliminate the weekend parties and some of the vandalism.

2. When the property owners call for a trespass or a vandalism violation, the Utah County Sheriff's Department will respond within 45 minutes maximum.

3. Utah County Public Works will install a new bridge over Thistle Creek. The existing bridge is not safe or designed for large fire trucks. If we are going to increase the traffic, we should bring the bridge up to county specifications to carry a minimum of 86,000 lb.

4. Utah County should agree to pave the existing county road from Hwy 89 to the gate by the Butler's home. This should be done to stop the dust problem that is created by the increase in traffic and to eliminate the need to grade and maintain the road.

5. Utah County, the Division of Wildlife Resources and the U.S. Forest Service should open all other accesses to the Nebo Mountain and the Loafer Mountain area to the public. Especially, the Crab Creek area and the Salt Hollow or gas line road. As well as the Dream Mine and Covered Bridge roads. This would equally distribute the publics use and not concentrate it only to Bennie Creek.

6. We agreed to a 16 feet Right-Of-Way not an 18 feet Right-Of-Way. Therefore, we would propose that Utah County install a fence on both sides of the Right-Of-Way. Eight feet from the center of the road all the way through the private property. This would clearly define the Right-Of-Way and should discourage people from trespassing. Also, Utah County should maintain said fence as it is their Right-Of-Way.

7. Utah County should install and maintain at least one surveillance camera at or near the existing gate.

8. The road is not a county road and should not appear as such on the county road maps in order to avoid confusion in the future.

9. The plaintiffs should be financially responsible for the defendants loss due to the public use of this road. Such as livestock shot or stolen, signs, gat fences, water control devices, equipment or homes that are shot, stolen or damaged. The defendants should be reimbursed the fair market value as such within 60 days or they can lock the gate to eliminate the risk of additional vandalism.

#10. The agreement may be amended as the need arises and as negotiated by both parties in order to avoid court action.

#11. During seasonal road closures, the public use will be at the defendants discretion. (There may be late season hunts for certain species of animals that we would like to have harvested)

#12. If the plaintiffs breach the agreement, they should loose their Right-Of-Wa (Otherwise, they would have no incentive to abide by this agreement).

One other solution that would be the preference of all the land owners is to hav Utah County abandon the entire road, allow us to put in a gate similar to Covere Bridge's and allow us to maintain the road at our own costs rather than paying c costs as has been the case for the last 7 years. As for the most part, we have repaired , graded and otherwise maintained the road in the past as it is.

Respectfully,

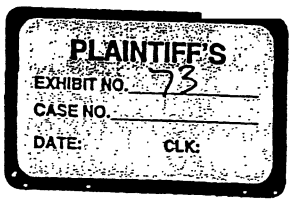
Randy Butler

Randy Butler

Blaine Evans

Blaine Evans

** NOTICE **



TO: Randy Butler
Donna Butler
2721 East 17050 South
Birdseye, UT 84629

DATE: July 18, 1997

Pursuant to Utah County Ordinance 17-3-1-1 and Utah Code Annotated 27-12-135, a person may not place, construct or maintain any pole or any other structure or object of any kind or character within the right-of-way of any County road or highway without the permission of the Board of Utah County Commissioners. You have, without the permission of the Utah County Board of Commissioners, placed a gate across the Bennie Creek Road, which is a County road under Utah County Ordinance 17-1-1.

You are hereby given notice to remove from the Bennie Creek Road any and all poles, structures or objects of any kind or character placed, constructed or maintained by you within the right-of-way of the Bennie Creek Road, including, but not limited to, any gates placed thereon by you.

If , within ten(10) days of service of this notice on you, you fail to remove from the Bennie Creek Road any and all gates, poles, structures or objects of any kind or character placed, constructed or maintained by you within the Bennie Creek Road right-of-way, the Utah County Commission may remove the same at your expense and recover costs and expenses from you including the sum of $10.00 for each day the same remains within the Bennie Creek Road right-of-way after this notice was served upon you or bring an action to abate the same as a nuisance. If judgement is recovered by the Commission, the Commission may also recover in the addition to having the same abated the costs of action and the sum of $10.00 for every day such nuisance remained in the Bennie Creek Road right-of-way after service of this notice upon you.

Govern yourself accordingly.

David J. Gardner, Chairman,
Utah County Board of Commissioners

MCG:tae

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DOCKET NUMBER: CV-97-2510 PROCESS: NOTICE

PLAINTIFF: UTAH COUNTY BOARD OF COMMISSIONERS

VS

DEFENDANT: BUTLER, RANDY

ATTORNEY: UTAH COUNTY BOARD OF COMMISSIONERS

COURT: COURT IS NOT NEED DEPUTY: RICHARD CASE

DATE RECEIVED: 7/22/1997 TIME ENTERED: 1043

CHARGE DESCRIPTION	AMOUNT	PAID
TOTAL:	0.00	

HOME ADDRESS: 2721 E 17050 SOUTH
BIRDSEYE UT 84629

DATE SERVED: 7/29/1997 TIME SERVED: 17:30 ATTEMPTS TO SERVE: 1

DATE RETURNED: 7/30/1997

COMMENTS: DO NOT POST!
SERVED HEIDI BUTLER/DAUGHTER

* * * * * CHECK FOR POSSIBLE WARRANT * * * * *

RETURN OF SERVICE

TATE OF UTAH / COUNTY OF UTAH } S.S. SHERIFF'S OFFICE

:KET NUMBER: CV-97-2510

?VED: BUTLER, RANDY DEFENDANT

TE RECEIVED: 7/22/1997 DATE SERVED: 7/29/1997

OCESS: NOTICE

'PE OF SERVICE: OTHER

EFT AT RESIDENCE WITH: HEIDI BUTLER
IS/HER RELATIONSHIP IS: DAUGHTER
ND THIS IS HIS/HER PLACE OF ABODE AND IS OF SUITABLE AGE AND DISCRETION.

ERVICE ADDRESS: 2721 E 17050 SOUTH
CITY: BIRDSEYE STATE: UT

I FURTHER CERTIFY THAT AT THE TIME OF SERVICE, ON COPY SERVED,
I ENDORSED THE DATE, SIGNED MY NAME AND OFFICIAL TITLE THERETO.

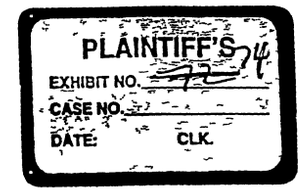
SHERIFF'S FEES

TOTAL 0.00

DAVID R. BATEMAN, SHERIFF OF UTAH COUNTY, STATE OF UTAH

I CERTIFY THAT THE FORGOING IS TRUE AND CORRECT
AND THAT THIS CERTIFICATE IS EXECUTED ON

DATE 7/30/1997 BY Richard Case
(DEPUTY SHERIFF) RICHARD CASE



** NOTICE **

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Donna Butler
2721 East 17050 South
Birdseye, UT 84629

DATE: July 18, 1997

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Govern yourself accordingly.

David J. Gardner, Chairman,
Utah County Board of Commissioners

MCG:tae

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UTAH COUNTY SHERIFF

DOCKET NUMBER: CV-97-2511 PROCESS: NOTICE

PLAINTIFF: UTAH COUNTY BOARD OF COMMISSIONERS

VS

DEFENDANT: BUTLER, DONNA

ATTORNEY: UTAH COUNTY BOARD OF COMMISSIONERS

COURT: COURT IS NOT NEED DEPUTY: RICHARD CASE

DATE RECEIVED: 7/22/1997 TIME ENTERED: 1043

CHARGE DESCRIPTION	AMOUNT	PAID
TOTAL:	0.00	

HOME ADDRESS: 2721 E 17050 SOUTH
BIRDSEYE UT 84629

DATE SERVED: 7/29/1997 TIME SERVED: 17:30 ATTEMPTS TO SERVE: 1

DATE RETURNED: 7/30/1997

COMMENTS: DO NOT POST!
SERVED HEIDI BUTLER/DAUGHTER

* * * * * CHECK FOR POSSIBLE WARRANT * * * * *

STATE OF UTAH / COUNTY OF UTAH } S.S. SHERIFF'S OFFICE

DOCKET NUMBER: CV-97-2511

SERVED: BUTLER, DONNA DEFENDANT

DATE RECEIVED: 7/22/1997 DATE SERVED: 7/29/1997

PROCESS: NOTICE

TYPE OF SERVICE: OTHER

LEFT AT RESIDENCE WITH: HEIDI BUTLER
HIS/HER RELATIONSHIP IS: DAUGHTER
AND THIS IS HIS/HER PLACE OF ABODE AND IS OF SUITABLE AGE AND DISCRETION.

SERVICE ADDRESS: 2721 E 17050 SOUTH
CITY: BIRDSEYE STATE: UT

I FURTHER CERTIFY THAT AT THE TIME OF SERVICE, ON COPY SERVED,
I ENDORSED THE DATE, SIGNED MY NAME AND OFFICIAL TITLE THERETO.

SHERIFF'S FEES

TOTAL 0.00

DAVID R. BATEMAN, SHERIFF OF UTAH COUNTY, STATE OF UTAH

I CERTIFY THAT THE FORGOING IS TRUE AND CORRECT
AND THAT THIS CERTIFICATE IS EXECUTED ON

DATE 7/30/1997 BY Richard Case
(DEPUTY SHERIFF) RICHARD CASE